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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 468

WIRT A. WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 83-90) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 90). The petition for a writ of certiorari was filed on November 30, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether one "who knowingly counsels * * * another to refuse or evade registration" under the Selective Service Act may be convicted of violating Section 12(a) of that Act despite the fact that his advice is not followed.

2. Whether the trial court committed reversible error in not instructing the jury, as petitioner requested, that a bona fide purpose on his part to secure a judicial test of the validity of Section 12(a) of the Selective Service Act would constitute a valid defense.

3. Whether Section 12(a) of the Selective Service Act of June 24, 1948, either inherently or as applied in the instant case, is invalid under the First Amendment as an unwarranted restriction of the freedoms of speech and religion.[1]

STATUTES INVOLVED

The pertinent provisions of the Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604 (50 U. S. C. App. 451) are as follows:

> Sec. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen

[1] Other questions raised by the petitioner as to the validity of the indictment, self-incrimination, and alleged improper instructions (Pet. 5) are not deemed worthy of separate statement and are briefly treated *infra*, note 8, pp. 16-17.

and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder.

* * * * *

Sec. 12. (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

On December 2, 1948, petitioner Wirt A. Warren, forty years old, a practicing physician in Wichita, Kansas, was charged in the United States District Court for the District of Kansas with knowingly counseling, on or about October 23, 1948, Walter Dean Murrah, who was required to register for training and service in the United States armed forces under the 1948 Selective Service Act, to

refuse and evade such registration in violation of § 12(a) of the Act (R. 4, 34).[2]

The evidence adduced at the trial is undisputed and is briefly set forth:

Petitioner, a Unitarian Church member and opposed to war, believing that its elimination could best be effected by resistance to compulsory military training and for the purpose of informing the Government of his beliefs and his actions pertaining thereto, wrote the following letter to the Department of Justice on September 22, 1948 (R. 35, 36, 37, 38, 39, 41-42, 52):

> This will inform you that I am not obeying and do not intend to obey Paragraph a, of Section 12 of the Selective Service Act of 1948, which is that portion of the Act which provides a penalty for *knowingly* counseling, aiding, or abetting another to refuse or evade registration or service with the armed forces.
>
> I have urged my stepson, W. Dean Murrah, and others not to register under the Selective

[2] Petitioner filed a motion to dismiss the indictment as bad for duplicity and uncertainty because it also charged in the same count that petitioner knowingly counseled Murrah to refuse *to serve in the armed services* (R. 4, 5-6, 32-33). The court denied the motion holding that the inclusion of such language was not particularly "objectionable" since no evidence was introduced in support of this charge and he would so charge the jury (R. 33). Accordingly, the jury was instructed that the sole issue in the case was whether petitioner knowingly counseled Murrah to refuse to register (R. 71, 72, 75). In connection with the counseling, the indictment originally charged that petitioner "did unlawfully, willfully, * * * openly and intentionally advocate, [and] advise" Murrah to evade registration but on petitioner's motion, the quoted words were stricken as surplusage (R. 4, 5).

> Service Act of 1948, and I intend to continue to counsel him and others to refuse registration and service under this law.
>
> The Selective Service Act of 1948, is a law which I feel morally bound to break. I have arrived at this conclusion entirely on a personal basis and not as the result of influence by any religious, pacifist, or political group. In particular I wish to make it clear that I am *neither* a *Communist nor* a fellow-traveler. [R. 19-20, Gov. Ex. 1.]

A few weeks prior to October 20, 1948, the eighteenth birthday of petitioner's stepson, Walter Dean Murrah [3] and the date on which Murrah became eligible for registration under the Selective Service Act, petitioner, while working about the house with Murrah and entirely on his own initiative, advised him not to register for military training when he became of age (R. 22-23, 27, 41, 46-47). When Murrah indicated that such action constituted a criminal offense, punishable by imprisonment, petitioner replied, "that might be the best thing to do" (R. 23, 41, 47). As an alternative, he suggested that Murrah leave for Canada or Mexico, with petitioner bearing the expense (R. 23, 41). He continued to so advise Murrah on several occasions thereafter up to October 25, 1948 (R. 46, 47, 48), but Murrah ignored the advice

[3] Petitioner provided an education and a home for Murrah with him, his wife (Murrah's mother whom he married in 1939), and their two children (R. 21, 24, 34-35).

and registered as required on that date (R. 23-24, 48).

Upon receipt of the above-quoted letter by the Department of Justice, two Federal Bureau of Investigation agents interviewed petitioner in his office in November 1948. Petitioner freely and without any coercion whatsoever, after being warned that the interview was entirely voluntary, that he had a right to a lawyer and that anything he said could be used against him, said (and reiterated at the trial) that during World War II by virtue of his classification as a conscientious objector, he served in a conscientious objector's camp and later as a physician in the Eastern State Hospital at Williamsburg, Virginia; that having received a copy of the 1948 Selective Service Act from his Congressman in June 1948 and studied it, he was familiar with all its provisions, particularly the prohibitions contained therein against his actions relating to counseling to evade registration; that irrespective of this, "his belief was such that he could not conscientiously obey this law and that as a result * * * it was necessary for him to advise people not to register"; that pursuant to such belief he so counseled Murrah; that although he had not as yet counseled others in this manner, he intended to do so; and that he placed in his waiting room pamphlets urging non-registration. (R. 25-30, 39-40, 41, 42, 45, 46-47, 48, 50, 52.)

In his testimony, petitioner explained that the motivating factor behind his advice to his stepson was his honest and conscientious opposition to war and violence for any purpose whatsoever, resulting from religious teaching, his own thinking and reading from 1939 to date, and his belief that "there are certain laws [relating to war particularly] which are detrimental to mankind as a whole and therefore should not be obeyed,"—laws which he felt "morally bound to break"; that he desired to inculcate these beliefs in Murrah as part of his religious education and as "a way to the better life" (R. 36, 37, 38, 39, 41-42, 44, 45-46, 50, 52, 53, 54); and that since 1940 his thinking on the subject had evolved to a point where he felt that merely registering as a conscientious objector was not a sufficiently vigorous expression of opposition to war (R. 37-38). On direct examination, in reply to a question whether his purpose in counseling was to test the validity of the law, petitioner replied in the affirmative (R. 52, 55).

At the conclusion of the trial, the judge (Mellott, D. J.) denied petitioner's request to instruct the jury to the effect that a bona fide intent to test the validity of the law in question was a valid defense to a charge of "knowingly counseling" (R. 7, 62) and instead charged the jury as follows (R. 74):

> In outlining to you the charge made in this case you will remember that I used the word "knowingly" that the defendant did know-

> ingly counsel. The word knowingly is not used in this statute in any highly technical sense, but it is to be taken in its ordinary and commonly understood meaning as designating an act done intentionally, with an awareness of what one is doing, and not the result of mere disinterest, ignorance or inadvertence.

Petitioner was found guilty and sentenced to two years' imprisonment (R. 12-13, 80). On appeal, the judgment of conviction was affirmed (R. 90).

ARGUMENT

1. The petitioner contends (Pet. 18-21) that his admitted counsel of refusal or evasion, not having borne fruit since his stepson did in fact register under the Selective Service Act, was not in violation of Section 12(a) of the Act. So to read the Act of 1948 is to turn one's back on history; for, under World War I statutes relating to the same type of offense as is here charged, this Court made it perfectly clear that there was "no ground for saying that success alone warrants making the act a crime." *Schenck* v. *United States,* 249 U. S. 47, 52; *Goldman* v. *United States,* 245 U. S. 474, 477; see also *Reeder* v. *United States,* 262 Fed. 36 (C. A. 8), certiorari denied, 252 U. S. 581.[4] It is patent

[4] The cases here cited involved conspiracies to violate the Espionage Act of 1917. The point at issue in the case at bar appears not to have been decided under the Selective Draft Act of 1917, 40 Stat. 76, which in language perhaps more favorable to petitioner's contention than the present act in that it omits the word "counsels", penalized any person who "evades or aids another to evade the requirements of this Act." Section 6. Cf. *Fraina* v. *United States,* 255 Fed. 28, 33 (C. A. 2).

on the face of Section 12(a) that many primary offenses are created which may be committed by persons other than those who are required to register or serve. Congress plainly intended to deter, by these penal provisions, not only those who might themselves be reluctant to register or serve in the Nation's armed forces, but also to curb any action which would tend to interfere with speedy and efficient operation of the Selective Service recruitment machinery. The charge here involved is not of a secondary, dependent offense; the statute makes the counselling of which petititoner has been convicted a primary, independent crime. This is the conclusion recently announced by the Court of Appeals for the Sixth Circuit in *Gara* v. *United States,* decided November 28, 1949.

2. Petitioner maintains that the jury was not properly instructed, as requested, with regard to the bearing upon criminal intent of an asserted purpose on his part to test the validity of Section 12(a) (Pet. 9, 56-62). The trial judge charged the jury (*supra,* pp. 7-8) that the statute requires only that the defendant act intentionally and consciously.

We submit that the denial of petitioner's requested instruction and the granting of the one given was entirely correct. Assuming it to be true, as petitioner contends, that a "corrupt intent" is an element of the crime in question and requires consciousness of wrongdoing, petitioner

is not aided by this rule. He was clearly conscious that his urging and counselling Murrah not to register would violate the Act and, further, that by failing to register, Murrah would also commit a criminal offense (*supra,* pp. 4-5).

That he may have been conscious of no wrongdoing in some moral or religious sense (cf. Pet. 56-59) is, if at all relevant, a defense not available at this stage. For petitioner requested no instructions along these lines of the trial court (R. 6-11); the question of consciousness of wrongdoing *vel non,* even in the non-secular sense, is one of fact for the jury, and an appellate court cannot be asked to decide a question not sought to be submitted to the jury.

Petitioner further contends that, despite his knowledge that a violation of the statute was involved in his conduct, he would be excused if his purpose was in good faith to secure a test of the constitutional issues,[5] under the authority of *Keegan* v. *United States,* 325 U. S. 478, and *Okamoto* v. *United States,* 152 F. 2d 905 (C. A. 10), based on the *Keegan* decision. But genuine belief in the unconstitutionality of a statute is not recognized as a valid defense. *Ex parte Young,* 209 U. S. 123, 147-148; *United States* v. *Anthony,* 24 Fed. Cas. No. 14,459 (C. C. N. D. N. Y.). As

[5] The uncontradicted testimony that petitioner suggested to his stepson that he might go to Canada or Mexico at petitioner's expense, in order to escape registration (R. 23), leaves little room for his present contention that he was seeking to create a "test case".

Mr. Chief Justice Stone, expressing his dissenting views and those of Mr. Justice Reed, Mr. Justice Douglas, and Mr. Justice Jackson, in *Keegan* v. *United States,* 325 U. S. 478, 505, put it:

> Plainly one who would assail the validity of a statute in a test case can do so only by violating its provisions, here by knowingly counselling another to evade registration or service in the armed forces. One who thus evaded or counselled evasion of military service could not defend on the ground that he violated the Act in order to test its constitutionality. He nevertheless does the act which the statute prohibits and nonetheless intended to do it even though his purpose was to establish that the statutory prohibition is unconstitutional. There is no freedom to conspire to violate a statute with impunity merely because its constitutionality is doubted. The prohibition of the statute is infringed by the intended act in any case, and the law imposes its sanctions unless the doubt proves to be well founded.

In other words, petitioner's contention is self-contradictory: if the purpose to test constitutional validity is a defense, there can be no test, for courts will not render advisory constitutional opinions where a case of violation of the statute has not been made out.

The opinion in the *Keegan* case upon which the petitioner relies, that of Mr. Justice Roberts, concurred in by Mr. Justice Frankfurter and Mr. Justice Murphy (there being no opinion of the

Court), is not to the contrary. The judgment there reflected rested on the view that the Government had failed to prove a case of counselling "to *evade registration or service*" under Section 11 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311. (Emphasis supplied by Mr. Justice Roberts, 325 U. S. 478.) Mr. Justice Roberts found a crucial distinction between the words "evade" and "refuse". The latter was not in the 1940 Act and, Mr. Justice Roberts said, "Plainly enough the Act distinguishes evasion, a species of fraudulent conduct, from mere neglect of duty and from forcible and violent interference or resistance". 325 U. S. at 487. Evasion was said to connote "artifice" and one "with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; * * * but this is not knowingly counselling, *stealthily and by guile*, to evade its command." 325 U. S. at 493-494, emphasis supplied.

These views have no bearing on this case. Congress, in enacting the Act of 1948, here involved, inserted the word "refuse" (see Section 12(a), *supra*, p. 3) and thus supplied the omission discerned by Mr. Justice Roberts and those who joined with him in the Act of 1940. The Senate Committee reporting on the bill which became the 1948 Act, pointed out that while it "is substantially a reenactment of section 11 of [the 1940] act",

"certain changes of language have been made to incorporate judicial determinations made pursuant to the predecessor act." S. Rep. No. 1268, 80th Cong., 2d Sess. p. 20. Thus the general rule, reflected in Chief Justice Stone's opinion in the *Keegan* case, is here applicable.

3. Petitioner attacks Section 12(a) of the Selective Service Act as in violation of the freedoms of speech and religion guaranteed by the First Amendment. But the constitutional issues thus tendered will be found, we believe, to be less novel and extensive than petitioner maintains.

The question of abridgment of the right of free speech, must be considered as settled by decisions of this Court[6] in cases which involved attempts by means of speeches and circulars to obstruct the recruiting and enlistment of young men in the service of the armed forces. The cases correspond to that here, the only distinction being that they did not involve the identical statute and the violations occurred during the period of actual hostilities. The first distinction is clearly irrelevant to the question of constitutionality since the statute here prohibits the same class of offenses considered

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[6] *Schenck* v. *United States*, 249 U. S. 47; *Gilbert* v. *Minnesota*, 254 U. S. 325; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Ruthenberg* v. *United States*, 245 U. S. 480; *Goldman* v. *United States*, 245 U. S. 474; for decisions in other federal courts, see *Dunne* v. *United States*, 138 F. 2d 137 (C. A. 8), certiorari denied, 320 U. S. 790; *Fraina* v. *United States*, 255 Fed. 28 (C. A. 2); *Gara* v. *United States*, decided November 28, 1949 (C. A. 6), involving the identical statute.

in those cases—attempting to impede recruitment by words. Likewise, the second distinction is not significant in the circumstances of this case. Our state of war has not yet ended (*Ludecke* v. *Watkins*, 335 U. S. 160) and it is clear, moreover, that the power of Congress to "raise and support armies" and to "provide and maintain a navy" exists both in peace and war.

Section 12(a) of the Selective Service Act of 1948 makes it unlawful knowingly to counsel non-registration. Petitioner, while recognizing that the rights guaranteed by the First Amendment are not absolute, contends that there was no "clear and present danger" to national security justifying the passage of such a measure (Pet. 26-31). But Congress, in Section 1(b) of the Act here involved, declared "that an adequate armed strength must be achieved and maintained to insure the security of this Nation." That declaration must certainly suffice as an answer to petitioner's attack on the statute on its face (*Whitney* v. *California*, 274 U. S. 357; *Gitlow* v. *New York*, 268 U. S. 652). And even if more is needed to sustain the validity of its application to the case at bar, there is no real difficulty. For the "substantive evil" of which there must be a "clear and present danger" may be something less than the destruction of our Government.[7] The

[7] *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331, particularly Mr. Justice Frankfurter, concurring, at 328 U. S. 353.

evil which Congress here sought, and had a right, to prevent was resistance to the requirement of registration. The question in this case must be whether petitioner's counsel to Murrah created a clear and present danger of that evil. The answer, we submit, is clear. Were the speaker's relationship with his auditor a less intimate one, were his influence on the person being counselled less strong than that of father on son, the question might be more difficult. But when a father advises a son not to register and offers to pay for an escape to Canada or Mexico, the danger of resistance to registration is clear and present if those words have any meaning. And, if "incitement" is a touchstone of validity (cf. Pet. 6-7) it is present in this case.

Petitioner's claim of infringement of freedom of religion, buttressed by the claim of parental right, may be similarly disposed of, for "it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others." *Prince* v. *Massachusetts*, 321 U. S. 158, 164. If petitioner's freedom of speech argument must be rejected, so must this.

As was said in the *Prince* case, the state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." 321 U. S. at 166. That principle was stated and applied in a case in which the child's conduct in question was itself an exercise of a right protected by the First

Amendment. Resistance to the draft, as such, has no such stature. Counselling such resistance is, consequently, no more immune from regulation in the national interest than permitting preaching by children on the streets.

Finally, petitioner's attempt to deny that conscientious objection to service is a matter of legislative grace, not constitutional right (Pet. 35-56, but see *Hamilton* v. *Regents,* 293 U. S. 245, 264) has no real relevance here. Any alleged "right" to refuse to serve does not, of necessity, carry with it the right to urge the same course on others. That right to proselytize is, of course, the right to speak or to practice one's religion and it is not, as we have sought briefly to show above, violated by petitioner's conviction.

This case is aptly described by Mr. Justice Cardozo, concurring in *Hamilton* v. *Regents,* 293 U. S. 245, 268: "One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."[8]

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[8] Other questions raised by petitioner may be shortly disposed of: (1) *The indictment*—the colloquy appearing at R. 76-78 disposes of the contention that the indictment was defective in that it failed to charge that petitioner's stepson was not within any of the exceptions to the registration requirement found in the Act. See also *Edwards* v. *United States,* 312 U. S. 473, 482-483. As shown in the Statement, *supra,* p. 5, petitioner is plainly in error when he states (Pet. 63) that "The proof is clear he [Murrah] was *not* 18 when counseled." Nor was the trial judge powerless to rule (R. 33) that the charge of counselling refusal and evasion of *service* should not be submitted to the jury. *Goto* v. *Lane,* 265 U. S. 393, 402-403. Finally, it is clear that the indictment was not void for du-

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1950.

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plicity. *Crain* v. *United States*, 162 U. S. 625, 634-636, and cases cited; *Connors* v. *United States*, 158 U. S. 408, 410-411. (2) *Self-incrimination*—the charge that the petitioner's privilege in this respect was violated by the admission in evidence of his letter to the Department of Justice is baseless. Petitioner was not forced to write it; he did so voluntarily. Moreover, he waived his privilege by taking the stand at his trial. (3) *Instructions*—petitioner appears to complain of nothing in the instructions which is not dealt with elsewhere under different descriptive headings.

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